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No. 85-343

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury in an action brought under the Age Discrimination in Employment Act (ADEA) must be instructed that the plaintiff has the burden of proving that the employer's explanation for its employment decision is a pretext, although the jury was instructed that the plaintiff had the burden of showing that the age of the employee in question was a "determinative factor" in the decision to discharge him.

2. Whether the court of appeals erred in holding erroneous a jury instruction that required a finding of specific intent to violate the ADEA for an award of double damages, and in remanding the case to allow the finder of fact to determine whether double damages were appropriate under the standard set forth by this Court in *Trans World Airlines, Inc.* v. *Thurston,* No. 83-997 (Jan. 8, 1985).

3. Whether an award of future damages in lieu of reinstatement is available under the ADEA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24a-41a) is reported at 763 F.2d 1166. The prior opinion of the court of appeals (Pet. App. 1a-19a), which was vacated by this Court on January 14, 1985, is reported at 741 F.2d 1225. The district court did not issue an opinion.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1985. A petition for a writ of certiorari was filed on August 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Equal Employment Opportunity Commission (EEOC) brought this action alleging that the petitioner, Prudential Federal Savings and Loan Association (Prudential), violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, by discharging or demoting several employees because of their age. Prudential argued that the discharges were part of a general reduction in force necessitated by an economic downturn. The case was tried to a jury, which was instructed that the Commission had the burden of proving that "the age of the employee in question was a *determinative factor* in defendant's decision to discharge him. That is . . . *but for* his age, he would not have been so treated" (Pet. App. 29a; emphasis added). The jury returned a verdict finding liability with regard to one former employee, Douglas Tanner.[1]

The jury awarded Tanner $34,200 in past lost wages and benefits (Pet. App. 24a). However, the jury declined to award double damages under 29 U.S.C. 216, which provides for such awards "in cases of willful violations." The jury had been instructed that a willful violation occurs only if there is specific intent to violate the Act.[2] The district

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[1]The EEOC's complaint was brought on behalf of six other individuals as well. The jury found that they had suffered no discrimination, and the Commission did not challenge that determination on appeal (Pet. App. 24a n.1).

[2]The district court's instruction stated, in relevant part:

> A willful violation occurs when a person acts *with specific intent to violate the law,* where with knowledge of the law he proceeds, or it proceeds, to violate the law *knowingly and intentionally*.
>
> In other words, you can find willful discrimination for age, or willful violation of the law, *only if you find* both that Prudential violated the law by discharging or reassigning complaining employees because of their age, and *that Prudential knew, or should have known* at the time that it decided to discharge or

court entered judgment on the jury's verdict. It also awarded future damages of $17,000 to compensate Tanner for "lost retirement and pension benefits accruing through normal retirement" in lieu of reinstatement (Pet. App. 24a).

Both parties appealed. The EEOC challenged the district court's jury instructions regarding the standard for awarding double damages, arguing that the district court erred in instructing the jury that the EEOC had to show that petitioner specifically intended to violate the Act. Petitioner challenged, inter alia, the district court's instructions on the standard for proving age discrimination and its award of future damages. On the liability issue, petitioner complained that the district court had refused to give an instruction stating that the EEOC had the burden of proving that its business reasons for firing Tanner were a mere pretext for age discrimination. On the future damages issue, petitioner argued that, while the district court could order Tanner reinstated, it could not award any future damages in lieu of reinstatement.

2. The court of appeals affirmed the finding of liability. The court rejected petitioner's challenge to the jury instructions after concluding that, viewed as a whole, the instructions "accurately set out the relevant legal standards" (Pet. App. 7a). The court of appeals concluded that the instruction requested by the petitioner—that the EEOC must prove that petitioner's explanation for the discharge was a pretext for discrimination—"could have misled the jury into thinking that even though [it] found age to be the determinative factor, it nonetheless would be required to return a verdict for Prudential unless the EEOC also proved

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reassign the complaining employees, *that such decisions* and actions *were in violation of the law and were intentionally and knowingly done in violation thereof.*

Pet. App. 38a; emphasis added.

that Prudential's reasons were invalid" (*ibid.*). The court noted that such an understanding of the standard of proof would be mistaken since "a plaintiff need not prove that the reasons offered by the defendant are false if he proves that age was also a reason, and that age was the factor that made a difference" (*ibid.*).

Concerning double damages, the court of appeals agreed with the EEOC that the district court "erroneously imposed too strict a standard by requiring proof that the employer specifically intended to violate the law" (Pet. App. 15a). Instead, the court held that a violation is willful "when the employer 'acted in the face of the ADEA' and was 'fully aware that the Act was 'in the picture' " (*id.* at 16a, quoting *Mistretta* v. *Sandia Corp.*, 639 F.2d 588, 595 (10th Cir. 1980)). As there was uncontested evidence that petitioner was aware of the Act's applicability to its employees, the court held as a matter of law that the violation was willful and that Tanner was therefore entitled to double damages (Pet. App. 17a).

With respect to the district court's award of future pension benefits in lieu of reinstatement, the court determined that, while reinstatement is the preferred remedy, future damages can be awarded where reinstatement is impossible as a practical matter because the employer has exhibited extreme hostility toward the individual (Pet. App. 12a-13a). The court noted that an award for future damages may be necessary to achieve the ADEA's "make whole" purposes and to prevent employers from frustrating its aims (*ibid.*). Although there was evidence showing that petitioner's hostile attitude precluded reinstatement of Tanner (*id.* at 14a), the court nonetheless directed the district court on remand to reconsider its award of future damages, and "to articulate the evidence and rationale underlying its decision" (*ibid.*). Judge Barrett dissented from the determination that future damages can be awarded under the ADEA, concluding

instead that such damages are too speculative (*id.* at 18a-19a).

3. Prudential petitioned for a writ of certiorari, challenging the award of double damages and the court of appeals' holding that an award of future damages in lieu of reinstatement is authorized under the ADEA. The EEOC suggested that the Court hold the petition because the question of the standard for awarding double damages was then before the Court in *Trans World Airlines, Inc.* v. *Thurston (TWA),* No. 83-997 (Jan. 8, 1985). The EEOC opposed review of the other issues raised by Prudential.

On January 8, 1985, this Court issued its opinion in *TWA*. The Court concluded that a plaintiff is not required to show that a defendant "intended to violate the Act" in order to obtain double damages (slip op. 13 n.19). On the other hand, a plaintiff has to show more than that the defendant "knew that the ADEA was 'in the picture' " (slip op. 14-15). Rather, the Court concluded that the correct standard is whether the defendant "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (slip op. 13-14). Shortly after issuing the *TWA* decision, the Court granted the petition for a writ of certiorari in this case, vacated the judgment of the court of appeals, and remanded for further consideration in light of *TWA*.

On remand, the court of appeals issued an opinion identical to its earlier opinion, except with respect to the double damages issue. On that issue, the court reiterated its prior conclusion that the district court's instruction had erroneously required proof of specific intent to violate the law (Pet. App. 38a). The court of appeals noted that in *TWA* this "Court specifically rejected the definition used by the district judge here by disagreeing with the argument that a violation is only willful when a defendant intends to violate

the Act" (Pet. App. 39a; citations omitted). The court of appeals recognized that the Court in *TWA* also rejected its own earlier formulation of the definition of willfulness, which focused on whether Prudential knew that the ADEA was "in the picture" (Pet. App. 39a). The court concluded after reconsideration of the record that it was unable to determine as a matter of law whether the violation here was willful in light of the "reckless disregard" standard adopted in *TWA*. Consequently, it remanded the case so that this determination could be made by the finder of fact in the first instance (*ibid.*).

ARGUMENT

1. Petitioner challenges (Pet. 5-7) the court of appeals' conclusion that it was not necessary to instruct the jury that it had to find for petitioner unless it found that petitioner's explanation for discharging Tanner was a mere pretext.[3] The court of appeals correctly held that the instruction given by the district court properly and clearly put the central issue directly before the jury for its determination: whether the EEOC had proved by a proponderance of the evidence that Tanner was discharged because of his age. Review by this Court is unwarranted because neither *TWA* nor any other decision of any court requires that a jury in an ADEA action be instructed that it make specific findings in accord with the paradigm for the shifting of burdens of production and the burden of proof established by *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973).

TWA, which nowhere addresses jury instructions, does not support petitioner's contention. Indeed, the Court reiterated that it is not appropriate to apply inflexibly the *McDonnell Douglas* analysis to every discrimination case

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[3]Although petitioner now contends that the issue warrants review, petitioner failed to challenge the instruction in its prior petition for a writ of certiorari.

(slip op. 8-9). See also *United States Postal Service* v. *Aikens,* 460 U.S. 711, 714 (1983) (framing issue in *McDonnell Douglas* terms after case was fully tried on the merits "unnecessarily evade[s] the ultimate question of discrimination *vel non*"); *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 577 (1978) (prima facie case method "never intended to be rigid, mechanized or ritualistic"). Petitioner's error lies in confusing the relationship between the Title VII paradigm for proving discrimination by circumstantial evidence and appropriate ADEA jury instructions. The Title VII proof scheme, which facilitates the orderly development and assessment of evidence in a bench trial, directly transposes into principles controlling the court's grant or denial of a directed verdict or of a judgment notwithstanding the verdict in an ADEA action tried to a jury. The Title VII scheme also provides the court in an ADEA jury trial with guidelines so that its charge to the jury properly identifies the factual determinations to be made. The judicially created presumptions, inferences, and evidence production burdens of Title VII do not, however, directly transpose into jury instructions in ADEA actions. See generally *Lovelace* v. *Sherwin-Williams Co.,* 681 F.2d 230 (4th Cir. 1982).

Contrary to petitioner's assertion (Pet. 6), the First Circuit, which specifically and at length addressed the question of proper jury instructions in an ADEA action, did not require a pretext instruction in every discrimination case. Rather, the court explained that the trial judge "should not force a case into a *McDonnell Douglas* format if to do so will merely divert the jury from the real issues * * *. [T]he best charge may simply be one that emphasizes that plaintiff must prove, by a preponderance of the evidence, that he was discharged because of his age—with adequate explanation of * * * the determinative role age must have played * * *." *Loeb* v. *Textron, Inc.,* 600 F.2d 1003, 1018 (1st Cir. 1979). Accord *Blackwell* v. *Sun Electric Corp.,* 696 F.2d 1176,

1179 (6th Cir. 1983) (district court did not err in refusing to instruct jury that the employer's explanation for plaintiff's discharge dispelled the inference of discrimination unless the jury found the proferred reason to be a pretext); see also *Goodman* v. *Heublein, Inc.*, 645 F.2d 127, 130 (2d Cir. 1981) ("it may not necessarily be helpful to bring [the *McDonnell Douglas* test] to the attention of the jury"); *Laugesen* v. *Anaconda*, 510 F.2d 307, 312 (6th Cir. 1975) (the *McDonnell Douglas* test does not "deal with the problems and procedures inherent in the submission of issues to the jury").

The charge here when read in its entirety accurately instructed the jury, in accord with the decisions of every court that has considered the issue, that to hold petitioner liable it had to find that the EEOC proved by a preponderance of the evidence that "the age of the employee in question was a determinative factor" in petitioner's discharge decision, that is, "but for" age the discharge would not have occurred (Pet. App. 29a). See *Perrel* v. *Finance America Corp.*, 726 F.2d 654, 656 (10th Cir. 1984); *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 915-916 (3d Cir. 1983); *Pena* v. *Brattleboro Retreat*, 702 F.2d 322, 323 (2d Cir. 1983); *Cuddy* v. *Carmen*, 694 F.2d 853, 857-858 (D.C. Cir. 1982); *Spagnuolo* v. *Whirlpool Corp.*, 641 F.2d 1109, 1111-1112 (4th Cir. 1981); *Kelly* v. *American Standard Inc.*, 640 F.2d 974, 984 (9th Cir. 1981); *Loeb* v. *Textron, Inc.*, 600 F.2d at 1019-1020.[4]

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[4]Petitioner baldly asserts (Pet. 7) that refusing to give its proposed pretext instruction misled the jury "into believing that an employer has the burden of not only articulating but of proving a nondiscriminatory explanation for its discharge." However, the instructions given made clear that the burden of proof was on the the EEOC with regard to each and every essential element of its claim (Tr. 1106) and that the jury was "not * * * to sit in judgment of the business decisions made by Prudential" (Tr. 1109). The jury verdict, which found for petitioner with regard to six of the seven employees whom EEOC sought to prove were victims of age discrimination, refutes any contention that the jury was misled.

Moreover, the courts below were correct in concluding that insertion of the pretext instruction in the charge that was given to the jury would likely have confused the jury and distracted it from the ultimate question before it for determination (Pet. App. 30a). As this Court explained in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), "[t]he use of the term 'pretext' * * * does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race * * *[;] no more is required to be shown than that race was a 'but for' cause." *Id.* at 282 n.10. Giving the pretext instruction could well have misled the jury into believing that it had to find that age was the sole cause of Tanner's discharge.

2. Nor is there merit to petitioner's claim (Pet. 8-15) that the double damages issue warrants review. The court of appeals on remand correctly held that the district court's instruction on double damages was erroneous in light of this Court's decision in *TWA*, and further review of the instruction is unwarranted, particularly in light of the comprehensive discussion of the correct standard in *TWA*. The court of appeals' conclusion that it was unable to determine as a matter of law whether double damages should be awarded under the *TWA* standard and its remand of the issue were also correct. Petitioner challenges this holding on factual grounds that do not merit review by this Court.

a. In *TWA*, this Court held that a violation is willful so as to warrant double damages "if the employer * * * knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (slip op. 13-14, quoting *Air Line Pilots Ass'n* v. *Trans World Airlines*, 713 F.2d 940, 956 (2d Cir. 1983)). In so holding, the Court made clear that it "d[id] not agree with [the] argument that unless [an employer] intended to violate the Act, double damages are inappropriate under section 7(b) of the ADEA" (slip op.

13 n.19). In this case, the trial court explicitly instructed the jury that for the violation to be willful, it would have to find that petitioner "act[ed] with specific intent to violate the law" (see Pet. App. 38a). As the court of appeals held, in *TWA* this Court "specifically rejected the definition used by the district judge * * * by disagreeing with the argument that a violation is only willful when a defendant intends to violate the Act" (Pet. App. 39a; citation omitted).

In arguing that the district court's willfulness definition "encompasses the purpose and thrust of the ADEA as interpreted in *TWA*" (Pet. 9), petitioner ignores the explicit instruction requiring proof of specific intent (see note 2, *supra*) and this Court's rejection of that standard. While the description of the "reckless disregard" standard as "an acceptable * * * definition" (slip op. 16) implies the possibility of permissible alternatives, the instruction given in the case is clearly unsatisfactory.[5]

b. Having correctly concluded that both the district court's "specific intent" test and its own "in the picture" test had been rejected, the court of appeals proceeded to reexamine the violation here under the standard set forth in *TWA*. Although both parties argued, albeit with opposing conclusions, that a determination could be made by the court of appeals on remand, the court determined that it could not resolve the willfulness issue as a matter of law and remanded the issue for a factual determination.[6] Petitioner

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[5]Although petitioner now argues that the instruction permitted a finding of willfulness for reckless actions, petitioner argued in its previous petition for a writ of certiorari that the instruction properly required proof of specific intent to violate the ADEA. See No. 84-681 Petition at 5-8.

[6]The EEOC stated in its brief on remand that if the appellate court determined that the record is insufficient from which to conclude that Prudential acted in reckless disregard of the ADEA's prohibitions, the case should be remanded for a new trial on that issue.

argues that this ruling should be reviewed "to clarify the standards surrounding the good faith defense set forth in *TWA* v. *Thurston*" (Pet. 15). The *TWA* standard needs no clarification at this time. It would be particularly inappropriate to reexamine the standard in a case, such as this, in which neither party tried the issue of willfulness with the *TWA* standard in mind and no lower court has yet ruled on whether the standard was satisfied.

Furthermore, contrary to petitioner's assertions (Pet. 10-11), there are grounds on which the trier of fact could conclude that petitioner "knew or showed reckless disregard" for whether its discharge of Tanner was prohibited by the ADEA. Although petitioner relies heavily on its evidence that Tanner was discharged for business reasons unrelated to age (Pet. 14), the jury disbelieved the company and found that Tanner's age was the determinative factor in the discharge. Similarly, petitioner relies only on its evidence regarding its reduction in force, in particular its directions to managers to comply with the ADEA (Pet. 10-11, 13), disregarding the EEOC's evidence of statements by Prudential's president and other officials "which the jury reasonably could construe as suggesting that age played a determinative role in the company's selection of employees for termination" (Pet. App. 31a) and statistical evidence showing a significant correlation between age and discharge during the reduction in force.[7] There is thus at a minimum sufficient evidence tending to show that petitioner acted in reckless disregard of the requirements of the ADEA when it

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[7]While this evidence was presented as proof of petitioner's liability, petitioner concedes that "a proper and fair determination of willfulness must necessarily be based on the same jury finding that there was an intentional violation of the ADEA based on complete development of the facts and circumstances of the case" (Pet. 11-12 n.4; citation omitted).

discharged Tanner to preclude a ruling that petitioner's violation was not willful as a matter of law under the *TWA* standard.[8]

3. The court of appeals' conclusion that future damages can be awarded in lieu of reinstatement in appropriate circumstances under the ADEA does not merit further review.[9] As an initial matter, the court of appeals remanded the future damages issue to the district court to determine whether the facts here justify a future damages award and to set forth the evidence and rationale supporting its determination (Pet. App. 37a). Thus, as no decision to award future damages has been made by the courts below in this case, review by this Court would be premature.

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[8]The context in which the violation here occurred and petitioner's attitude regarding the ADEA stand in marked contrast to the analogous facts in *TWA*. The violation in *TWA*—restrictions on down-bidding procedures for age-based transfers that did not apply to nonage-based transfers—was but a subsidiary issue in a more complex legal problem that arose when changes in the law required the modification of TWA's personnel practices in ways not contemplated under an operative collective bargaining agreement and which, moreover, had previously been immunized from the ADEA's reach. As this Court stated, TWA's violation occurred because it "[a]pparently * * * failed to focus specifically * * * [and] simply overlooked the challenged aspect of the new plan" in its attempt to comply with the complexities of a changing statute (slip op. 17). In contrast, petitioner's violation—discharging an employee because of his age—did not arise as an unforeseen and tangential consequence of attempting to comply with developing law, but rather went directly to the core purpose and prohibition of the ADEA as originally enacted. Unlike TWA, petitioner presented no evidence that it relied on legal advice prior to, or during, its reduction in force. In any event, petitioner was faced with no overriding legal complexities obscuring the basic prohibition of the ADEA forbidding discharge of older workers because of their age.

[9]Contrary to petitioner's implication (Pet. 15), this Court did not single out the issue of future damages for reconsideration when it vacated the opinion below and remanded the case for reconsideration in light of *TWA*. Since *TWA* did not involve the issue, the court of appeals properly reinstated its prior opinion on this point without change.

Contrary to petitioner's assertion (Pet. 15-20), the circuits are not in conflict on the issue of whether future damages may be awarded under the ADEA. The Second, Sixth, Eighth, Ninth, and Eleventh Circuits agree with the Tenth Circuit that where reinstatement is inappropriate future damages can be awarded under the remedial provisions of the ADEA. *O'Donnell* v. *Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1551 (11th Cir. 1984); *Davis* v. *Combustion Engineering Inc.*, 742 F.2d 916, 922-923 (6th Cir. 1984); *Whittlesey* v. *Union Carbide Corp.*, 742 F.2d 724, 727-728 (2d Cir. 1984); *Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir. 1982); *Cancellier* v. *Federated Department Stores*, 672 F.2d 1312, 1319 (9th Cir.), 459 U.S. 859 (1982). Petitioner's claim of conflict (Pet. 16) is based entirely on dicta in a footnote in a decision of the First Circuit. See *Kolb* v. *Goldring*, 694 F.2d 869, 874-875 n.4 (1st Cir. 1982). Five days after this petition was filed, however, the First Circuit made clear that future damages may be awarded under the ADEA. *Wildman* v. *Lerner Stores Corp.*, No. 84-1394 (Aug. 28, 1985). After reviewing the decisions of the other courts of appeals, including this case (slip op. 21-23), the court held that, while "[f]uture damages should not be awarded unless reinstatement is impracticable or impossible," the ADEA gives courts "discretion to award front pay" (*id.* at 24). Thus, there is no conflict.

Furthermore, the courts of appeals are correct in holding that future damages are available as an equitable remedy under the ADEA. Petitioner contends that future damages are precluded under the ADEA because the remedial provisions of the Act incorporate parts of the Fair

Labor Standards Act (FLSA).[10] Petitioner argues that because future damages are not available under the incorporated sections of the FLSA they cannot be awarded under the ADEA. Petitioner's argument misses the point. Future damages are not awarded under the FLSA remedies incorporated into the ADEA, but are awarded as equitable relief in lieu of reinstatement under a provision of the ADEA that expressly provides the courts authority "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act], including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation." 29 U.S.C. 626(b). The court of appeals in this case correctly held that if reinstatement is not practicable because of hostility between the parties, future damages may be awarded in lieu of reinstatement. Such an award is fully consistent with Congress's intent that victims of age discrimination be made as fully whole as possible. See *Whittlesey,* 742 F.2d at 728; *Gibson,* 695 F.2d at 1097; *Rodriquez* v. *Taylor,* 569 F.2d 1231, 1238 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978).

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[10]The ADEA provides, in part, that it is to be "enforced in accordance with the powers, remedies and procedures of Sections 211(b), 216 (except for subsection (a) thereof) and 217 of [the FLSA]," and further provides that "amounts owing" to a victim of age discrimination "shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purpose of section 216 and 217 of [the FLSA]." 29 U.S.C. 626(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1985

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